NO. 42793-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TROY PERKINS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00694-6

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Lise Ellner
P.O. Box 2711
Vashon, WA 98070
liseellnerlaw@comcast.net

This brief was served, as stated below, via U.S. Mail, the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED November 30, 2012, Port Orchard, WA
Original e-filed at the Court of Appeals; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Perkins's illegal sentence must be vacated?

2. Whether, assuming his sentence is not vacated, the sentencing conditions imposed by the trial court, with the exception of the term "pornography" and the prohibition on hitchhiking are proper? [PARTIAL CONCESSION OF ERROR]

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Troy Perkins pled guilty and was convicted of sexual exploitation of a minor in violation of RCW 9.68A.040. CP 10, 47. The trial court imposed, pursuant to the stipulation of the parties, a determinate exceptional sentence of 100 months and a 36-month term of community custody. CP 48, 49.

On appeal, Perkins sought to vacate various conditions of his community custody. In responding to the appeal, the State realized that the sentence itself was illegal, because the Sentencing Reform Act required that Perkins be sentenced to an indeterminate sentence under RCW 9.94A.507. The State therefore moved to remand the case for imposition of a legal sentence, or to allow Perkins to withdraw his plea. The Commissioner denied that motion.

The State filed a motion to modify the Commissioner's ruling, which

the Court denied. The Court nevertheless ruled that it could consider the issue in the interests of judicial economy and instructed the State address the issue in its brief.

B. FACTS

The facts are set forth in the probable cause statement. CP 4-6.

On May 11, 2011, an anonymous person reported to CPS that a Ann Wilson, a 26-year-old woman, was performing oral sex on her own daughter via webcam. This was alleged to have occurred on May 6 or 7, 2011. The person also claimed to have seen Wilson masturbating herself with the child in the room. CP 4.

The next day CPS received an email report that stated that Wilson had been on her webcam the previous night having oral sex with her daughter CLP, who was four years old. The webcam was purported to be on a Yahoo! "BBW" chat room. The person sending the email gave two email addresses he claimed belonged to Wilson, and expressed a willingness to provide a statement. He did not provide any contact information, however, and did not respond to return emails. CP 4.

On that day, CPS and a Bremerton Police detective contacted Wilson at her home. They informed her of the allegations. Wilson responded that she suspected the allegations came from Perkins, with whom she had had a

recent sexual relationship. CP 4.

Wilson had begun an online relationship with Perkins, who lived in Kenmore, in February 2011. She did not know he was a registered sex offender when the relationship began. The relationship developed into an in-person physical one, although Wilson denied that Perkins had ever been to her home. CP 5.

They continued to communicate through email, web chats, and instant messaging. Wilson admitted to sending him nude images of herself and to masturbating on webcam at Perkins's request. CP 5.

Wilson ended the relationship around May 2011, and Perkins was upset. She believed the ending of the relationship prompted the calls to CPS. CP 5.

Wilson then went to her mother's house so she could print copies of Perkins's emails.[1] While there, a dispute broke out after Wilson confessed to her mother, Jane, that she had sexually assaulted her daughter, CLP. Jane refused to let Wilson leave with the daughter, and called the police CP 5.

A Sheriff's Deputy arrived, and Wilson admitted to him that she had simulated performing oral sex on CLP while Perkins watched via webcam.

[1] Wilson had filed a police report the previous day reporting that her computers, X-Box, and TV had been stolen in a burglary. CP 5.

Wilson asserted that Perkins had persuaded her to do it. Afterwards, Perkins told Wilson that he had enjoyed the display, and had masturbated while watching it. Wilson thereafter broke up with Perkins. CP 5.

In subsequent emails, Perkins appeared angry and threatened to call CPS. He told Wilson that he wanted to see her one last time. Wilson responded, "hope it was good for you going to cost me years of my life." She further states that "it was your idea with [CLP]" and "I wanted to please you." Perkins responded, "After what I went thue (sic) I wouldn't touch a kid."[2] Wilson retorted, "yeah you got me to do it for you." CP 5.

In a subsequent interview, Wilson stated that Perkins had been trying to get her to molest her daughter for two weeks before the actual abuse occurred. Eventually she relented, and while Perkins watched via webcam, she placed CLP, naked, on her bed. She spread CLP's labial folds with her hands and placed her nose and mouth near the child's vagina. Wilson denied ever actually penetrating the vagina with her tongue, but admitted that her nose did touch it. CP 6.

The police then obtained a warrant to search Perkins's home. Perkins admitted to the police that he had raised the subject of Wilson having sex with her daughter several times. At first, Wilson did not want to. He stated

---

[2] The police determined that Perkins was a Level 2 sex offender who had previously been

that around the beginning of May, Wilson called and told him that CLP was "riding" her and sucking on her "titties." Perkins asked if he could watch. Wilson turned on her webcam. Both she and CLP were naked, and Wilson put her face between her daughter's legs. CP 6.

Perkins claimed that he only watched for about five seconds, but that they might find a five minute video of it on his computer. He also denied masturbating while he watched. He admitted that he had told Wilson that he was, but claimed that he was not really. CP 6.

Perkins also admitted to visiting three different internet sites featuring mothers and daughters. He said, however, that he did not "think" the police would find other child pornography on his computer. The police then arrested Perkins and booked him into the Kitsap County Jail. CP 6.

III. ARGUMENT

A. PERKINS'S SENTENCE IS ILLEGAL AND MUST BE VACATED

Perkins was convicted of sexual exploitation of a minor in violation of RCW 9.68A.040. CP 47. This crime is a sex offense. RCW 9.94A.030(46)(a)(iii). The indeterminate sentencing provisions of RCW 9.94A.507 apply to any offender who is convicted of a sex offense and who

---

sentenced to prison for raping a 5-year-old girl. CP 5.

has a prior conviction of a "strike" offense.[3] RCW 9.94A.507(1)(b). Perkins has a prior strike offense, first-degree rape of a child. RCW 9.94A.030(37)(b)(i);[4] CP 47. He is therefore subject to RCW 9.94A.507.

Perkins was not, however, sentenced under that statute. Instead, the trial court imposed, pursuant to the stipulation of the parties, a determinate exceptional sentence of 100 months and a 36-month term of community custody. CP 48, 49. Because this sentence is illegal the judgment must be vacated.

1. This Court may consider this issue.

The State originally moved to remand the matter to resolve the illegal sentence and to dismiss the appeal as moot. Perkins opposed the motion and the Commissioner denied the State's motion because she found that the State was seeking affirmative relief and had not filed a notice of cross-appeal.

The State first would note that it is questionable whether it had standing to file a notice of cross-appeal. Only an "aggrieved party" may appeal. RAP 3.1. Here, the judgment was entered upon the joint agreement of the parties. Since the State received the result it requested, albeit

---

[3] *See* RCW 9.94A.030(37); *see also* Reviser's Note to RCW 9.94A.507(1)(b) and Laws of 2010, ch. 274, § 401.

[4] Perkins was 20 at the time of the prior offense, and thus clearly falls within the definition, assuming *arguendo* that RCW 9.94A.030(37)(b)(ii) were incorporated into RCW 9.94A.507(1)(b). *See* CP 47.

mistakenly, it cannot have been considered an aggrieved party in the trial court. *See State v. Carter*, 138 Wn. App. 350, ¶ 44, 157 P.3d 420 (2007) (party that prevailed at the trial level is not an aggrieved party).

The Commission relied primarily on *State v. Sims*, 171 Wn.2d 436, 256 P.3d 285 (2011), where in the absence of a notice of cross-appeal, the Supreme Court concluded that the Court of Appeals should not have ordered a resentencing when the defendant challenged certain conditions but not his underlying SSOSA sentence. The Commissioner overlooked, or minimized, the salient difference between *Sims* and the present case, however. In *Sims*, the State was challenging the trial court's discretionary, but *lawful*, decision to impose a SSOSA sentence. *See Sims*, 171 Wn.2d at ¶ 16 ("The grant of a SSOSA sentence is entirely at a trial court's discretion, so long as the court does not abuse its discretion by denying a SSOSA on an impermissible basis."). Here, however, the sentence imposed is *unlawful*.

In addressing RAP 2.4(a)'s "necessities of the case" exception to the requirement of a cross-notice of appeal, the Supreme Court cited to *Seattle v. Marshall*, 54 Wn. App. 829, 830–31, 776 P.2d 174 (1989), for an example of when the necessities of the case provision applies. *Sims*, 171 Wn.2d at ¶ 15. In *Marshall*, the defendant filed a limited appeal, challenging only the superior court's ruling that, despite a finding that his affidavit of prejudice was timely filed in municipal court, his remedy was limited to resentencing,

thus precluding a withdrawal of his guilty plea. The Court of Appeals found that in Marshall's case, because the available remedy was necessarily linked to the determination of timeliness, the appeal "'compel[led] review of the underlying ruling on timeliness as well, despite the City's failure to request cross review.'" *Id.* (*quoting Marshall*, 54 Wn. App. at 831). The court found that the affidavit was not timely filed and that the remedy Marshall requested was therefore unavailable. *Id.* (*citing Marshall*, 54 Wn. App. at 833–34).

Here, Perkins seeks a remand to modify the judgment and sentence by striking certain conditions. However, because the entire sentence is itself illegal, as in *Marshall*, the remedy Perkins seeks is unavailable.

Petitioner's contention, noted by the Commissioner, that he entered the plea to avoid a sentence under RCW 9.94A.507 is therefore irrelevant.[5] As discussed, *infra*, in a case of mutual mistake, a defendant is not entitled to the imposition of an illegal sentence even if it was part of his plea bargain. It seems unlikely that the Supreme Court intended to vitiate this principle in *Sims*, particularly where the principle was only announced in *State v. Barber*, 170 Wn.2d 854, 248 P.3d 494 (2011), less than four months earlier.

Nor is the concern validly expressed in *Sims* regarding the potential chilling effect of allowing an un-noticed attack on the underlying *lawful*

[5] Nor does this contention appear to be a matter of record.

sentence present here. *See* Ruling at 5. As the Supreme Court held in *Barber*, a defendant has no right to enforce an illegal sentence.

Finally, the State also respectfully submits that the Commissioner's citation to *Jacques v. Sharp*, 83 Wn. App. 532, 545, 922 P.2d 145 (1996) is also misplaced. That case held as follows:

> Jacques asks us to direct the trial court to grant his motion for partial summary judgment that the City is liable for false arrest. RAP 2.4(a) states that this court will grant a respondent affirmative relief by modifying the decision under review only if the respondent cross-appeals or "if demanded by the necessities of the case." Jacques neither sought cross-review nor does he explain why the necessities of this case require that we grant him relief. His references to the Rules of Appellate Procedure are conclusory and include no argument. We therefore deny Jacques' request that we order the trial court to grant summary judgment to him.

Jacques, 83 Wn. App. at 545. Although the State did not explicitly cite to RAP 2.4(a), it clearly and succinctly explained why Perkins's sentence is illegal, and why it needs to be vacated. It further explained that because of those facts, the issues he raises in the instant appeal are moot. Because it would be in the interest of judicial economy and the necessities of the case, the State respectfully submits this issue should be addressed.

2. The sentence is illegal.

A determinate sentence imposed on a defendant subject to RCW 9.94A.507 is illegal. *In re Hudgens*, 156 Wn. App. 411, 233 P.3d 566

(2010).[6] The sentence must therefore be vacated. *In re Moore*, 116 Wn.2d 30, 38, 803 P.2d 300 (1991) ("[T]he actual sentence imposed pursuant to a plea bargain must be statutorily authorized").

Because this sentence was the result of a plea bargain, the matter does not end there, however. The record here is unclear as to whether Perkins was advised that he was subject to RCW 9.94A.507. While the plea agreement indicates that Perkins was subject to the statute, it also cited the community custody provisions for offenders "not sentenced under 9.94A.507." CP 11. Likewise, although the statement of defendant on plea of guilty recites at ¶ (f)(i)(bb) that if the current offense is a sex offense and the defendant has a prior conviction of first-degree rape of a child, the defendant will be sentenced under RCW 9.94A.507, the document does not reflect whether Perkins was made aware that his current offense was classified as a sex offense. CP 17-18. The record on appeal does not include the report of proceedings for the change of plea hearing. It is thus possible that Perkins's plea may have been involuntary. *See Hudgens*, 156 Wn. App. at ¶ 8.

The error here appears to have been one of mutual mistake. As such, Perkins's remedy if his plea was involuntary is to either endorse the plea

---

[6] As will be discussed below, the remedy of specific performance imposed in *Hudgens*, pursuant to *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988), was limited to situations not present here by the Supreme Court's decision in *State v. Barber*, 170 Wn.2d 854, 248 P.3d 494 (2011).

agreement and be sentenced accordingly under RCW 9.94A.507, or to withdraw his plea. *Barber*, 170 Wn.2d at ¶¶ 40-42.

The sentence here is clearly illegal. It must therefore be vacated. The only question, which cannot be answered with certainty on the present record is whether Perkins's plea was involuntary. The judgment should therefore be vacated and the cause remanded for the trial court to make a determination as to the voluntariness of the plea, and proceed accordingly thereafter.

B. WITH THE EXCEPTION OF THE TERM "PORNOGRAPHIC," AND THE PROHIBITION ON HITCHHIKING, WHICH SHOULD BE STRICKEN, PERKINS'S CONDITIONS OF COMMUNITY CUSTODY ARE PROPER.

Perkins argues that various conditions of his sentence are invalid. Assuming the Court reached the merits of the appeal, this claim would be without merit, except for the inclusion of the term "pornographic," and the prohibition relating to hitchhiking.

Washington sentencing courts are required to impose certain community custody conditions in specified circumstances and may impose others. *See* RCW 9.94A.703; *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). The conditions that may be imposed include requirements that the offender "comply with any crime-related prohibitions" and/or "Participate in rehabilitative programs or otherwise perform affirmative conduct

reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3). Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed only if it is manifestly unreasonable. *Bahl*, 164 Wn.2d at 753 (*citing State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)).

1. Vagueness

Perkins first contends that three terms in the conditions imposed by the trial court are vague: "sexually exploitative materials," "pornographic," and "shopping mall." He is correct only as to the term "pornographic."

As outlined above, imposing conditions of community custody is within the discretion of the sentencing court and will be reversed only if it is manifestly unreasonable. Imposition of an unconstitutional condition would, of course, be manifestly unreasonable. *Bahl*, 164 Wn.2d at 753. A statute or community custody condition is unconstitutionally vague if it "(1) does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Bahl*, 164 Wn.2d at 752-53 (*citing Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). If either of these requirements is not satisfied, the provision is unconstitutionally vague. *Bahl*, 164 Wn.2d at 753.

When deciding whether a term is unconstitutionally vague, the terms are not considered in a vacuum; rather, they are considered in the context in which they are used. *Bahl*, 164 Wn.2d at 754 (*citing Douglass*, 115 Wn.2d at 180). When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. *Bahl*, 164 Wn.2d at 754 (*citing State v. Sullivan*, 143 Wn.2d 162, 184-85, 19 P.3d 1012 (2001)). Finally, if "persons of ordinary intelligence can understand what the law proscribes, notwithstanding some possible areas of disagreement, the law is sufficiently definite." *Bahl*, 164 Wn.2d at 754 (*citing Douglass*, 115 Wn.2d at 179).

The requirement of sufficient definiteness "protects individuals from being held criminally accountable for conduct which a person of ordinary intelligence could not reasonably understand to be prohibited." *Douglass,* 115 Wn.2d at 178. Accordingly, a statute will be declared unconstitutional only if it "forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application." *Douglass*, 115 Wn.2d at 179. This test, however, does not demand impossible standards of specificity or absolute agreement. *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). Some amount of imprecision in the language of a statute will be tolerated: because we are "condemned to the use of words, we can never expect mathematical certainty from our language."

Robinson v. United States, 324 U.S. 282, 286, 89 L. Ed. 2d 944, 65 S. Ct. 666 (1945); *see also State v. Smith*, 111 Wn.2d 1, 10, 759 P.2d 372 (1988).

These requirements apply to conditions of probation as well as to statutes because a "probationer ... has a ... due process right to conditions of supervised release that are sufficiently clear to inform him of what conduct will result in his being returned to prison." *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002). However, statutes are not void for vagueness merely because all of their possible applications cannot be specifically anticipated:

> [A] statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. As this court has previously stated, "[I]f men of ordinary intelligence can understand a penal statute, *notwithstanding some possible areas of disagreement*, it is not wanting in certainty."

Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988) (emphasis the Court's). This principle applies to conditions of probation as well. *United States v. Phipps*, 319 F.3d 177, 193 (5th Cir. 2003).

When a court evaluates a statute for facial constitutionality, the court determines "if its terms 'are so loose and obscure that they cannot be clearly applied *in any context*.'" *State v. Sullivan*, 143 Wn.2d 162, 183, 19 P.3d 1012 (2001) (*quoting Weden*, 135 Wn.2d at 708, 958 P.2d 273 (1998)) (internal quotation marks omitted) (emphasis added).

Furthermore, the fact that a term in a statute is undefined does not automatically mean that the enactment is unconstitutionally vague. *Douglass*, 115 Wn.2d at 180. This is because for clarification, citizens may be expected to resort to the statement of law contained in both statutes and in court rulings which are "'[p]resumptively available to all citizens.'" *Douglass*, 115 Wn.2d at 180 (*quoting State v. Smith*, 111 Wn.2d 1, 7, 759 P.2d 372 (1988)).

a. "Possess/access no sexually exploitative materials"

Following the foregoing logic, the term "sexually exploitative materials," CP 65, cannot be deemed vague under Washington law. RCW 9.68A.040 makes the sexual exploitation of a minor a crime:

> (1) A person is guilty of sexual exploitation of a minor if the person:
>
> (a) Compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;
>
> (b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;

Thus, it follows that "sexually exploitative materials" are those which feature live or photographic performances of persons engaged in sexually explicit conduct. The latter term is defined by statute:

> "Sexually explicit conduct" means actual or simulated:
>
> (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;

(b) Penetration of the vagina or rectum by any object;

(c) Masturbation;

(d) Sadomasochistic abuse;

(e) Defecation or urination for the purpose of sexual stimulation of the viewer;

(f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and

(g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

RCW 9.68A.011(4). Moreover, the Supreme Court has held that the term "sexually explicit" itself is not vague. *Bahl*, 164 Wn.2d at 760. This term is not vague and the condition should be upheld.

b. "Pornographic sexually explicit materials"

Perkins next claims that the trial court erred in prohibiting him from possessing "pornographic sexually explicit material," CP 65, as a condition of his community custody. The State acknowledges that the Washington Supreme Court has previously found that the term "pornography" as used in a community custody condition was unconstitutionally vague. *Bahl*, 164 Wn.2d at 758. As noted above, however, the *Bahl* court found that the term "sexually explicit" was not unconstitutionally vague. *Bahl*, 164 Wn.2d at 760. The State would concede that pursuant to *Bahl* the term "pornographic"

should be stricken from this phrase, leaving prohibition as one against possessing "sexually explicit material."

c. "Do not loiter or frequent places where children congregate including, but not limited to shopping malls..."

Perkins's final vagueness challenge is to the term "shopping malls." The term is listed as one of the examples of the places where minors are known to congregate, which the condition prohibits Perkins from frequenting. CP 65. This term, particularly in the context in which it appears is not vague.

RCW 9.94A.703(3)(b) provides that a trial a trial court may, as a condition of community custody, require an offender to "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals." In light of this statute, the Washington Supreme Court has held that it is proper for a court to order a sex offender to "not frequent places where minors are known to congregate." *State v. Riles*, 135 Wn.2d 326, 347-49, 975 P.2d 655 (1998).

In the present case the judgment and sentence includes the following crime related prohibition:

> Do not loiter or frequent places where children congregate including, but not limited to, shopping malls, schools, playgrounds, and video arcades.

CP 46, 51. Perkins argues that this provision is unconstitutionally vague because the phrase "shopping mall" is vague and ambiguous.

As outlined above, a provision is not unconstitutionally vague if "persons of ordinary intelligence can understand what the law proscribes, notwithstanding some possible areas of disagreement, the law is sufficiently definite." *Bahl*, 164 Wn.2d at 754. Here the phrase "shopping malls" is readily and easily understood, especially given its context.

The trial court could have simply ordered (as in *Riles*) that Perkins "not frequent places where minors are known to congregate." Instead the court took the extra step of providing several examples of the types of places that were covered by this prohibition. Thus the trial court's prohibition was actually more clear and well-defined than the prohibition approved in *Riles*. In addition, the clear focus of this prohibition is on locations where children congregate. Thus the phrase "shopping malls" is easily understood to include those shopping malls that have shared common areas where people, especially children and teens, often gather and congregate.

Moreover, as Perkins points out, while a mall, in common parlance, is a species of shopping center, the reverse is certainly not true. The tortured examples he proffers disprove his point. There simply no way that a person of ordinary intelligence would construe the term "shopping mall" to include the Starbucks stand at Safeway. "Shopping mall" has a common and well-understood meaning: places such as Kitsap Mall, Tacoma Mall, Southcenter, and Northgate Mall. A shopping mall is a usually-enclosed pedestrian-

oriented shopping area anchored by department stores and a food court with smaller shops in between. It is not the neighborhood Safeway center. There is simply nothing about the trial court's order that is unconstitutionally vague.

2. Crime-related prohibitions

Perkins next challenges several of the crime-related prohibitions contained in his judgment and sentence. Again, with the exception of the prohibition related to hitchhiking, these contentions are without merit.

The term "crime related prohibition" is defined in RCW 9.94A.030. Under that section, no causal link need be established between the prohibition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *State v. Llamas–Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). Sentencing conditions, including crime-related prohibitions, are reviewed for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 36–37, 846 P.2d 1365 (1993).

a. "Do not hitchhike or pick up hitchhikers."

The State concedes that this provision, CP 65 & 71 ¶ 18, is not related to the circumstances of the crime, and therefore cannot be justified as a crime related provision. It should be stricken from the judgment and sentence.

b. "Contact no "900" telephone numbers that offer sexually explicit material."

c. "Frequent no adult book stores, arcades, or places providing

sexual entertainment"

These provisions, CP 65 & 71 ¶ 12, however, are clearly crime-related. As noted, no causal link must be established; the prohibition must merely be related to the circumstances of the crime. Here, Perkins persuaded the mother of a 4-year-old to have a simulated sexual encounter with her daughter. Perkins initially contacted the woman through a sexually-oriented website. It cannot be said that adult book stores or adult "900 numbers" are so different from an adult website that these provisions are not crime-related. All three may be used by people such as Perkins to meet others for the purpose of sexual encounters.

Perkins's argument that these businesses are presumably legal and licensed, and thus unlikely to offer child pornography is irrelevant. Perkins was not convicted of possessing illegal child pornography. He was convicted of exploiting a minor by means of first establishing a sexual relationship with the victim's mother and then persuading her to use her daughter for Perkins's sexual gratification. Presumably, the Yahoo! website Perkins met the mother on was legal as well.

These prohibitions are clearly related to the circumstances of the crime. The trial court did not abuse its discretion in imposing them.

IV. CONCLUSION

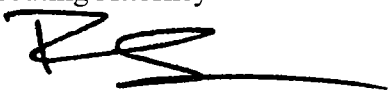
For the foregoing reasons, Perkins's judgment and sentence should be vacated, and the cause remanded for further proceedings in the trial court.

In the event the judgment is not vacated, cause should be remanded with instructions to strike the term "pornographic" and the prohibition relating to hitchhiking from the sentencing conditions. The remaining conditions should be upheld. The State would further request that if the Court declines to vacate the judgment on procedural grounds, that it explicitly acknowledge that the State would not be precluded from collaterally attacking the judgment in the trial court.

DATED November 30, 2012.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

MACINTOSH HD USERS RANDYSUTT DOCUMENTS WORK CASES PERKINS, TROY 11-1-00694-6 DA APP DOCS PERKINS, TROY STATE'S BRIEF OF RESPONDENT.DOC

KITSAP COUNTY PROSECUTOR

November 30, 2012 - 10:10 AM

Transmittal Letter

Document Uploaded: 427931-Respondents' Brief.pdf

Case Name: STATE OF WASHINGTON VS TROY PERKINS

Court of Appeals Case Number: 42793-1

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondents'
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Lori A Vogel - Email: lvogel@co.kitsap.wa.us